IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 7, 2008

STATE OF TENNESSEE v. THOMAS COGGINS

Appeal from the Criminal Court for Sumner County
No. 459-2003 Dee David Gay, Judge

No. M2008-00104-CCA-R3-CD - Filed February 25, 2009

The defendant, Thomas Coggins, appeals from the trial court's denial of his proffer of evidence during the hearing on his "Motion for New Hearing and For Arrest of Judgment," filed after his probation was revoked. Because neither the Tennessee Rules of Appellate Procedure, nor any other governing law, entitles the defendant to an appeal as of right under these circumstances, we dismiss his appeal.

Tenn. R. App. P. 3; Appeal Dismissed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and CAMILLE R. MCMULLEN, JJ., joined.

John D. Pellegrin, Gallatin, Tennessee and Stephen G. Young, Nashville, Tennessee (at trial); and David A. Collins, Nashville, Tennessee (at trial and on appeal), for the appellant, Thomas Coggins.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Bryna Landers Grant, Assistant District Attorney General for the appellee, State of Tennessee.

OPINION

On March 29, 2004, the defendant pleaded guilty to one count of aggravated assault, *see* T.C.A. § 39-13-102 (2003), and to one count of kidnapping, *see id.* § 39-13-303. The trial court sentenced the defendant to two consecutive sentences of four years' community corrections. The judgments reflect that the defendant was classified as a Range I, standard offender with a standard release eligibility. In February 2006, the defendant was released from community corrections and placed on supervised probation.

On March 22, 2007, the trial court issued a probation violation warrant, alleging that the defendant had been "charged by Hendersonville Police" with burglary of an automobile and simple assault. The State subsequently amended the violation warrant on May 17, 2007, to include

an arrest for domestic assault. The State again amended the violation warrant to reflect a failure to appear in court on June 22, 2007.

A revocation hearing was held on August 2, 2007, and proof was presented by the State and the defendant. At the conclusion of the hearing, the trial court revoked the defendant's probation on the basis of the defendant's committing the crimes of burglary of an automobile, simple assault, and domestic assault during his probationary period. The trial court, however, determined that the defendant did not intentionally fail to appear in court in June 2007 and excluded this as a basis for revocation. In a written order entered on August 21, 2007, the trial court revoked the defendant's probation and imposed his original sentence.[1]

The defendant then filed a "Motion for New Hearing and For Arrest of Judgment" on September 4, 2007. In support of his motion, the defendant argued that "[i]n large measure, the allegations against the [d]efendant stemmed from new charges that have yet to be adjudicated," "proof was adduced at the hearing that the [d]efendant suffered from medical conditions that may have contributed to some of his behavior," and "[t]he [trial] [c]ourt considered some evidence that was beyond the scope of a violation hearing." A hearing on this motion was held on November 30, 2007. Defense counsel told the trial court that "[he] filed this motion to arrest judgment to [toll] the time and to allow us to go forward today." Defense counsel explained that he wanted to present three witnesses: (1) the defendant's employer "who will testify that he is holding a job for him," (2) a minister "who has counseled with [the defendant]," and (3) a witness with knowledge "concerning [the defendant's] child and relationship."

The trial court denied the defendant's requests, stating, "How does that relate to the issue of whether or not he violated his probation? Those are more like sentencing issues." The trial court explained that it had already held a "full-blown hearing" and determined that the defendant had violated his probation. The trial court said, "Now, as a courtesy to any attorneys, if you have any proof that he didn't violate his probation, I'll be glad to hear that, but I'm not going to hear sentencing issues." Defense counsel responded that, although the proof he intended to offer did not deal with "whether or not the Court believes by a preponderance of the evidence that the defendant or probationer did in fact violate the terms and conditions of probation," he wanted to present the witnesses' testimony to aid the trial court in "what is an appropriate action to take." The trial court denied the defendant's motion for a new hearing and denied defense counsel's request to make an offer of proof by having the three witnesses state how they would have testified if called to the witness stand. The trial court entered a written order denying the defendant's motion on December 4, 2007.

On December 13, 2007, the defendant filed a notice of appeal. In his brief, the defendant vaguely states his sole issue as,

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[1] The trial court credited the defendant for community corrections credits for March 29, 2004, through February 27, 2006.

> It was error for the trial court to revoke the appellant's probation without giving him the oppourtunity [sic] to present mitigating testimony and therefore it was error and an abuse of discretion for the trial court to deny the appellant the oppourtunity [sic] to make an offer of proof for the record in this case.

Because of the manner in which the defendant has presented his appeal, we will begin our analysis by determining whether this appeal is properly before this court.

The State observes that "it is unclear whether the defendant is appealing the trial court's denial of [his 'motion for a new hearing and for arrest of judgment'] or its decision to revoke his probation." A close reading of the defendant's brief suggests that in this appeal he does *not* challenge the revocation of his probation. The defendant's brief states that "the basis or prime issue for this appeal is on the [t]rial [c]ourt's failure to allow an offer of proof." It continues, "Without the missing testimony from the [defendant's] witnesses whom the [t]rial [c]ourt refused to hear from, it would be premature to argue that the revocation of [defendant's probation] amounted to an abuse of discretion without said testimony in the record." Thus, the defendant challenges only the trial court's treatment of the hearing of his motion for new hearing and arrest of judgment.

Before this court may entertain the defendant's claim, we must consider whether we have jurisdiction to do so. Because there exists an issue of timeliness in perfecting the appeal, the issue of appellate jurisdiction should be first approached from an analysis of whether the trial court lost jurisdiction to act prior to the entry of its December 4, 2007 order. The record reflects that the trial court entered its judgment revoking probation on August 21, 2007. The defendant then filed his motion on September 4, 2007, and a hearing was held November 30, 2007. The denial order was entered on December 4, 2007.

Therefore, because the hearing and the disposition of the motion occurred more than 30 days after the entry of judgment, we first determine whether the trial court had jurisdiction to hold the hearing. Generally, a judgment in a criminal case becomes final 30 days after its entry, and thereafter, a trial court has no jurisdiction to modify it. *State v. Charles Alvin Haney*, No. 839 (Tenn. Crim. App., Knoxville, Mar. 29, 1989); *see also State v. Jack Lee Thomas, Jr.*, No. 03C01-9504-CR-00109, slip op. at 2-3 (Tenn. Crim. App., Knoxville, Nov. 15, 1995). However, in a criminal action, a trial court's jurisdiction may be extended by the timely filing of a motion for arrest of judgment or new trial. Tenn. R. App. P. 4(c). The record shows that the defendant filed a timely motion for arrest of judgment on September 4, 2007. *See* Tenn. R. Crim. P. 34(b) (stating that "a motion to arrest judgment . . . shall be . . . filed within thirty days of the date the order of sentence is entered"). The timely motion for arrest of judgment had the effect of continuing the trial court's jurisdiction until 30 days after it disposed of the motion by the December 4, 2007 order, with the result that the December 13, 2007 notice of appeal was timely.

However, even though the trial court had jurisdiction to hold the *hearing* in which the motions for a "new hearing" and arrest of judgment were considered, and although the notice of

appeal was timely, the issue of appellate jurisdiction remains. As mentioned earlier, the defendant only appeals the trial court's refusal to hear an offer of proof on the issue of whether the defendant should have been granted a new hearing. In fact, the defendant did not argue for an arrest of judgment at the hearing, the trial court did not consider the motion for arrest of judgment, and he does not argue the issue on appeal. The record reflects that the *only* reason that the defendant filed the motion to arrest judgment was to extend the jurisdiction of the trial court so that it could hear his motion for new hearing. Defense counsel stated at the November 30 hearing that "[he] filed this motion to arrest judgment to [toll] the time and to allow us to go forward." Thus, the defendant is appealing only the trial court's procedure in disallowing a proffer on the motion for, and otherwise denying, a "new hearing."

Although the timely filing of the motion for arrest of judgment was sufficient to grant the trial court jurisdiction to entertain the motion, the filing of that motion does not automatically grant the defendant an appeal as of right under the circumstances here presented. Rule 3(b) of the Tennessee Rules of Procedure governs the availability of an appeal as of right in a criminal action. The rule provides:

> In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and on plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(i) or (iv) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from *an order denying or revoking probation*, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.

Tenn. R. App. P. 3(b). The defendant clearly would have been entitled to an appeal as of right, had it been timely, from the trial court's order revoking his probation; however, he has made it clear that the revocation of his probation is not at issue in this appeal but rather the trial court's handling of the evidence at the hearing *subsequent* to the order of revocation.

Because the thrust of defendant's argument is only that the trial court mishandled his motion for new hearing, we must discern whether we have jurisdiction to review an alleged error in the trial court's hearing on the "motion for new hearing." Although this court has previously stated that "[t]he enactment of . . . the Tennessee Rules of Criminal Procedure abolished the petition to

rehear and motion to rehear in . . . criminal cases," *Ricks v. State*, 882 S.W.2d 387, 393 (Tenn. Crim. App. 1994), we may look beyond the title of a motion to discern the true identity of the motion, and a motion to rehear "can conceivably be considered a motion for a new trial," *id.* Because the defendant's motion to rehear followed the probation revocation, however, it would not be appropriate to treat the defendant's motion to rehear as a motion for new trial.

"It is generally recognized that there is a distinction between probation violation proceedings and criminal trials." *State v. Jackson*, 60 S.W.3d 738, 743 n.5 (Tenn. 2001) (citing *Barker v. State*, 483 S.W.2d 586, 589 (Tenn. Crim. App. 1972)). Further, unlike a trial, "'[a] parole revocation proceeding is not an adversarial proceeding.'" *Barker*, 483 S.W.2d at 589 (quoting *United States ex rel. Sperling v. Fitzpartrick*, 426 F.2d 1161 (2d Cir. 1970)). Under this analysis, a probation revocation hearing is not a "trial," and we are not free to treat the defendant's motion for rehearing as a motion for "a new trial." Rule 3 clearly delineates those rulings of the trial court from which an appeal of right lies and does not include the denial of a motion for rehearing.

Consequently, the defendant has no right to appeal to this court. He makes clear in his brief that he does not challenge on appeal the revocation of his probation and objects only to the trial court's denial of his offer of proof during the hearing on his motion for rehearing. A Rule 3 appeal of right does not lie from the denial of a petition for rehearing from an order revoking probation. *Cf. Kittrelle v. Philsar Dev. Co.*, 359 S.W.2d 837, 846 (Tenn. Ct. App. 1962) (recognizing that "'no appeal lies from an order refusing a rehearing'") (citation omitted).

Accordingly, the appeal is dismissed.

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JAMES CURWOOD WITT, JR., JUDGE